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No. _____

In The

Supreme Court of the United States

October Term, 1993

EL VOCERO DE PUERTO RICO
(CARIBBEAN INTERNATIONAL NEWS CORP.) et al.,

Petitioners,

vs.

CARLOS O. RODRIGUEZ, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment requirement that a publication, to be actionable, must be "of and concerning the plaintiff," allows relatives of a public official named in the publication and other third parties to recover damages against a newspaper for allegedly defamatory publication on the conduct of such official's official duties, notwithstanding the trial court's finding of fact that such relatives or third parties are not referred to or mentioned in the publication.

2. Whether the decision of the Puerto Rico Supreme Court permitting such unnamed relatives or third parties to recover damages against a newspaper for such an allegedly defamatory publication deprives petitioner and other local and national newspapers and media of First Amendment protections important for the functioning of a free press which they enjoy in the other jurisdictions of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Caribbean International News Corp. (El Vocero de Puerto Rico), Tomás de Jesus Mangual, his wife Ivonne Pérez Cedeño and their conjugal partnership,[1] respectfully pray that a Writ of Certiorari issue to review the Supreme Court of the Commonwealth of Puerto Rico.

I - JUDGMENT BELOW

By Opinion and unanimous (7-0) judgment entered on March 4, 1994, the Puerto Rico Supreme Court affirmed a Resolution entered on May 31, 1991 by the Superior Court of Puerto Rico, Ponce Section. A certified translation of the Opinion, reported officially in the Spanish language at 94 JTS 13, is included in the Appendix ("App.") hereto.

II - JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1258.

[1] Caribbean International News Corp. is a Puerto Rico corporation with offices in San Juan, which publishes the newspaper El Vocero de Puerto Rico; Tomás de Jesus Mangual is a reporter for El Vocero. The plaintiffs, Respondents herein, are Carlos O. Rodríguez, his wife Emerita Mercado Rodríguez and their conjugal partnership.

III - CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, United States Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

Fourteenth amendment, United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ".

Article II Sec. 8 of the Constitution of Puerto Rico: "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life."

Article 1802 of the Puerto Rico Civil Code, 31 L.P.R.A. Sec. 5141: "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the Party aggrieved does not exempt from liability, but entails a reduction of the indemnity."

IV - STATEMENT OF THE CASE

1. Statement of Facts

This is a libel case based on the publication of two news articles dated January 14 and 21, 1989, in the Spanish language daily newspaper El Vocero de Puerto Rico.[2]

[2] In Spanish, a "vocero" is a spokesman. El Vocero is the newspaper with largest circulation in Puerto Rico, and also circulates in more than twenty cities of the United States.

The gist of the first article is that respondent, Commander Carlos O. Rodríguez, Director of the Criminal Investigations Corps (CIC) of the Puerto Rico Police in Ponce,[3] had been overruled by the Police Commissioner in relation to the transfer of agents under his supervision. In the second article, the Commissioner was quoted as requesting the resignation of Commander Rodríguez.

Mr. Rodríguez and his wife filed a complaint against El Vocero alleging, in substance, that the articles were false and defamatory as to Mr. Rodríguez, and that Mrs. Rodríguez suffered emotional distress because of her husband's alleged defamation. The Opinion below found that Mrs. Rodríguez was not mentioned or identified in the publications. See App. p.2 n.1. It is also uncontroverted that the publications do not reflect on the personal or family life of Commander Rodríguez.

The Court below recognized a cause of action to Mrs. Rodríguez on the grounds that "the doctrine that states that the right to bring actions for defamation requires that the publication contain specific reference 'of and concerning the plaintiff', does not prevent the exercise of the cause of action by third parties for the damages suffered by them by cause of said defamation if that person for whose defamation they are claiming damages is personally identified in the publication . . . ". (Underlining in the original text). App. p. 1.

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[3] Ponce is Puerto Rico's second largest and most important city after San Juan.

In reaching that conclusion, the Court specifically distinguished *New York Times v. Sullivan*, 376 US 254 (1964) and *Rosenblatt v. Baer*, 383 US 75 (1966), as dealing with "impersonal statements made on issues of public importance". App. p. 9. It concluded that once the published statements "specifically focus on one person in particular," App. p. 11, and provided that the named plaintiff can allege the elements of a cause of action, then "his wife, children or third parties" also have a cause of action for damages. App. p. 13.

Succinctly put, the Opinion holds that the First Amendment is not an obstacle to a cause of action against a newspaper, by the relatives and "third parties" of a named individual, based on an allegedly false publication of public interest concerning ***that individual,*** even if the publication is not "of and concerning" those relatives or third parties.

The cause of action by Mrs. Rodríguez for emotional distress and mental anguish was recognized, because "[i]n constitutional terms, the specific reference requirement is satisfied in this situation." App. p. 11.

2. Procedural History

Upon the filing of the complaint on March 7, 1989, petitioners requested the dismissal of the cause of action by Mrs. Rodríguez as violative of the "of and concerning the plaintiff" requirement recognized under the First Amendment in this Court's decisions. Petitioners argued that the articles dealt with a matter of indisputable public interest, the gravamen of the complaint was grounded on

defamatory falsehood, and thus recognition of Mrs. Rodríguez's cause of action was repugnant to First Amendment principles since it would chill public debate on important matters of government.

The Superior Court denied our dispositive motion, and that ruling was affirmed by the Supreme Court of Puerto Rico in the Opinion and Judgment entered on March 4, 1994. The case was remanded to the Superior Court for further proceedings.

REASONS FOR GRANTING THE WRIT

1. The Opinion below is in conflict with this Court's decisions making the "of and concerning" requirement obligatory under the First Amendment.

New York Times and *Rosenblatt* constitutionalized the common law rule that a plaintiff may not recover damages flowing from an allegedly defamatory publication, unless it is "of and concerning" such plaintiff. The identification requirement is obligatory under the First Amendment. It became an essential part of the protections recognized to free-expression and free-press values, "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 US at 270.

After setting forth the constitutional standards for which the case is better known and usually cited, the Court in *New York Times* stated:

> We also think the evidence was *constitutionally defective* in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. [Emphasis ours]. *Id.* at p. 288.[4]

The Court rejected the proposition that Mr. Sullivan had been sufficiently identified through criticism of official conduct, because it would "sidestep" constitutional requirements "by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed." *Id.* at p. 292.[5]

In *Rosenblatt*, this Court held that "[t]here must be evidence showing that the attack was read as specifically

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[4] Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment' ", 1964 Sup.Ct.Rev. 191, 204, referred to this passage as stating that "the evidence was inadequate to connect the plaintiff with the assertions made in the advertisement."

[5] Four other officials had sued the Times for the same publication. The Court noted that, even if a newspaper can survive multiple judgments, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.*

directed at the plaintiff." 383 US at p. 82.[6] The Court stated that "[t]o the extent the trial judge authorized the jury to award respondent a recovery without regard to evidence that the asserted implication of the column was made specifically of and concerning him, we hold that the instruction was erroneous." *Id.* The Court reiterated that a plaintiff is constitutionally required to show "specific reference" in the publication. *Id.* at p. 83.

In the instant case, the Supreme Court of Puerto Rico concedes that Mrs. Rodríguez "was neither mentioned nor in any manner identified" in the El Vocero articles. App. p. 2. Thus, the Court below repeats the error made by the lower court in *Rosenblatt,* since it impermissibly leaves open the possibility of an award in favor of Mrs. Rodríguez without regard to the uncontroverted absence of evidence that the asserted implications of the El Vocero articles were made specifically of and concerning her.

The Court below characterizes *New York Times* and *Rosenblatt* as granting constitutional protection only to "impersonal" criticism of government. Such a reading ignores that the public debate that is meant to be protected may include sharp attacks "on government *and* public officials." 376 US at 270. (Emphasis ours). See also, *Hustler Magazine v. Falwell,* 485 US 46, 51 (1988); *Monitor*

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[6] The jury awarded damages to respondent because, although unnamed, he was a member of a small group of persons under suspicion of wrongdoing. It found liability "merely on the basis of his relationship to the government agency, the operations of which were the subject of discussion." *Id.*

Patriot Co. v. Roy, 401 US 265, 270-271 (1971); *Garrison v. Louisiana*, 379 US 64, 76-77 (1964), and cases cited therein.

In the past three decades, this Court has consistently adopted a subtle approach to reduce to a minimum the "tension [that] necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." *Gertz v. Robert Welch, Inc.*, 418 US 323, 342 (1974).[7] The Court below has neither trodden softly, nor in the right direction.

The citizenry, individually and collectively, is supposed to be the ultimate beneficiary of all First Amendment rights, beginning with freedom of thought and culminating with freedom of expression. The basic premise of such a scheme is the power of knowledgeable choice among a diversity of alternatives in the "marketplace" of ideas. First Amendment freedoms are aimed at guaranteeing the quantity and quality of available choices. To that end, *New York Times* and its progeny have established limitations on the recovery of damages stemming from erroneous publications, regardless of the particular cause of action alleged. The *New York Times* standard is premised on reducing or eliminating litigation as a means of preventing media self-censorship. In 1964 this Court warned that the First Amendment protections would be flexibly applied, and that no repression of free expression "can claim . . . talismanic immunity from constitutional limitations." 376 US at p. 269.[8]

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[7] "Whatever is added to the field of libel is taken from the field of free debate." *New York Times*, 376 US at 272.

[8] See also, *Hustler Magazine v. Falwell*, **supra**, in which this Court had no difficulty in applying *New York Times* principles to

The ruling below purports to bestow such "talismanic immunity" to claims by unnamed plaintiffs. It merely requires that pleadings affix labels other than "defamation" or "libel" to a cause of action by a "contingent" plaintiff, in order to circumvent the limitations of the First Amendment as elaborated in *New York Times* and its progeny. The ruling below makes constitutional protection dependent upon the creativity of plaintiffs' counsel in the pleading stage. Form would rule over substance.

The Court below does not cite a single precedent that would lend support to its reading of *New York Times* and *Rosenblatt*. We have been unable to locate any reported decision, state or federal, that has distinguished or attempted to limit this Court's pronouncements on the "of and concerning" requirement. On the contrary, this Court has let stand several decisions that have flexibly applied the identification requirement to preserve the First Amendment values at stake. See, e.g., *Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986), *cert. den.*, 485 US 934, (1988)[9]; *Barger v. Playboy Enterprises, Inc.*, 564 F.Supp.

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a cause of action for emotional distress instead of reputational harm. See, in general, Mead, "Suing Media for Emotional Distress: a Multi-Method Analysis of Tort Law Evolution," 23 Wash.L.J. 24 (1983); Wade, "The Communicative Torts and the First Amendment," 48 Miss.L.J. 671 (1977).

[9] "Although the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement: 'that constitutional protection does not depend on the label given the stated cause of action.' " 728 P.2d at 1182, (quoting, *Reader's Digest Ass'n v. Superior Court*, 690 P.2d 610 (1984), *cert. den.*, 478 US 1009 (1986)).

1151, 1153 (N.D.Cal. 1983), *aff'd.* 732 F.2d 163 (9th Cir. 1984), *cert. den.*, 469 US 853; *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. den.*, 462 US 1132 (1983).[10]

In *Gugliuzza v. K.C.M.C., Inc.*, 606 So.2d 790 (La.1992), the Supreme Court of Louisiana refused to recognize a cause of action to relatives of a deceased person, as unacceptable under the First Amendment.[11]

The Opinion below rejects the specific holdings and the substantive trajectory of this Court's decisions geared to broadly protect First Amendment values. The chilling effect of "contingent" liability is precisely what *New York Times* is meant to minimize, in order to preserve robust, uninhibited debate. Puerto Rico's definition of a tort cannot undermine the requirements of the First Amendment.

2. The Opinion below is an erroneous declaration of public policy that constitutes a "final judgment" and should be addressed without any further delay.

The unanimous Opinion of the Puerto Rico Supreme Court is a definitive declaration of public policy that is an immediately obligatory precedent in all pending and future cases in Commonwealth courts. There is "sufficient

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[10] Numerous decisions of state supreme courts as well as federal courts of appeals have uniformly applied the identification requirement without citing *New York Times.*

[11] It vacated the judgment of a lower court, recognizing such a cause of action under the Louisiana Civil Code. Similarly, the Court below bases the cause of action of a "contingent" plaintiff on art. 1802 of the P.R. Civil Code.

justification for immediate review of the federal question finally determined in the state courts." *Cox Broadcasting Corp. v. Cohn*, 420 US 469, at 479 (1975).[12] Delaying an authoritative adjudication would militate against First Amendment principles by letting stand a precedent that will certainly "harm the operation of a free press." *Miami Herald Pub. Co. v. Tornillo*, 418 US 214, 247 n.6 (1974).

As in *Cox*, 420 US at 483, "a refusal immediately to review the state court decision might seriously erode federal policy." *New York Times* and its progeny have established a First Amendment policy which is designed to reduce litigation against the press, in order to provide First Amendment rights the necessary "breathing space" so that debate on issues of public interest will remain uninhibited.[13]

A failure to decide the First Amendment issue would leave the communications media "operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt." *Cox*, 420

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[12] Puerto Rico courts are the equivalent of "state courts" in relation to their interpretation of First Amendment rights. *El Vocero de Puerto Rico v. Puerto Rico*, 113 S. Ct. 2004 (1993).

[13] See, Anderson, "Libel and Press Self-Censorship," 53 Tex.L.Rev. 422 (1975); Eaton, "The American Law Of Defamation Through *Gertz v. Robert Welch, Inc.* and Beyond: An Analytical Primer, 61 Va.L.Rev. 1349 (1975); "*New York Times v. Sullivan:* The Next Twenty Years" (Winfield, Chairman; Practising Law Institute, New York 1984).

US at 486.[14] That "shadow" could affect national newspapers, news services and magazines that freely circulate in Puerto Rico.[15] "Unnamed" libel plaintiffs who would face certain dismissal of their "contingent" claims in any other jurisdiction ruled by the First Amendment, could take advantage of the unique opportunities offered against the press in Puerto Rico.

In deciding to allow litigation against the press by unnamed plaintiffs, the class of potential plaintiffs is defined in expansive language. There are no elements of the ruling below left for refinement in future cases. "Relatives" may recover damages based on family ties with the principal plaintiff.[16] "Third parties" are not limited by

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[14] Indeed, after the issuance of the Opinion, El Vocero was forced to voluntarily dismiss pending motions for dismissal based on the "of and concerning" requirement in four (4) active cases. The issue had been decided in favor of El Vocero in five (5) previous Superior Court cases before the issuance of the Opinion. On March 30, 1994 a complaint was filed against El Vocero, expressly citing the Opinion below as authority, by the father and widow of a deceased individual shot during a robbery.

[15] See *Calder v. Jones*, 465 US 783 (1984) and *Keeton v. Hustler Magazine, Inc.*, 465 US 770 (1984), which allow a plaintiff to file a complaint in any jurisdiction in which the publication occurs, regardless of the defendant's principal place of business.

[16] "We cannot escape from the sociological and psychological reality that a wife, the children or the parents of a person who has been defamed, *by reason of their relationship with the person so defamed* can also be themselves affected by the publication of the defamation." (Underlining in the original text). App. p. 14. This conclusion must be understood in light of *Moa v. Commonwealth*, 100 DPR 573, 587 (1972), which authorizes Puerto Rico courts to take judicial notice that parents suffer mental anguish on the basis of their children's physical

having to prove any nexus with the principal plaintiff; they must simply allege that they have suffered mental anguish or emotional distress due to the principal plaintiff's alleged defamation. This makes it more difficult to dispose of these claims summarily.[17] The Court below is indifferent to the chilling effect that flows from protracted litigation against a virtually unlimited number and diversity of potential plaintiffs.

The precedential value of the ruling below cannot be doubted. The El Vocero articles are clearly of public interest. The conduct attributed in them to Police Commander Rodríguez is undeniably official. It is uncontroverted that the publications do not remotely point to the family or private life of the plaintiffs. It is difficult to imagine a publication more clearly deserving of First Amendment protection. By the same token, it becomes equally difficult to imagine that the Supreme Court of Puerto Rico would have the opportunity or inclination to refine or distinguish its unanimous ruling in the foreseeable future.

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suffering, and to grant recovery of those damages, even in the absence of proof to that effect.

[17] Given the highly subjective nature of the allegations that could be easily crafted, such actions would not readily lend themselves to summary dismissal, even if frivolous, since "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are reserved for trial on the merits. *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 255 (1986).

CONCLUSION

To our knowledge, this is the first time that a case is presented to this Court where the lower court's holding is against the recognition of the identification requirement regarding an allegedly false publication. In previous occasions, all denials of review by this Court, in state as well as federal cases pertaining to the "of and concerning" requirement, have let stand the recognition and application of the requirement.

The fact that the case inescapably involves important First Amendment issues justifies that the Court settle the matter authoritatively. Failure to do so would signify a truly adverse impact on freedom of the press in Puerto Rico. It could also be understood as a shift away from the First Amendment protections afforded the press under *New York Times* and its progeny, with widespread implications for the national communications media.

We respectfully request that this Honorable Court issue a Writ of Certiorari to the Supreme Court of Puerto Rico, and vacate the judgment entered on March 4, 1994.

Respectfully submitted, in Washington, D.C., this 6th day of May, 1994.

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(Certified Translation)

IN THE SUPREME COURT OF PUERTO RICO

The Conjugal Partnership constituted by Carlos O. Rodríguez, etc.	*	No. CE-91-414
Plaintiffs-Appellees	*	Certiorari
v.	*	
El Vocero de Puerto Rico Inc., et al	*	
Defendants-Petitioners	*	

OPINION OF THE COURT issued by MISTER ASSOCIATE JUSTICE ALONSO ALONSO

In San Juan, Puerto Rico, February 7, 1994.

Can a claim for recovery be made by those who suffer damage for the defamation made against a person related to them, or is said cause of action barred by the constitutional guarantees in favor of freedom of speech and of the press? This question, never before confronted by this Court, is the one presented in the above-captioned writ. According to the grounds that we shall next set forth, we resolve that the doctrine that states that the right to bring actions for defamation requires that the publication contain specific reference 'of and concerning the plaintiff', does not prevent the exercise of the cause of action by third parties for the damages suffered by them by cause of said defamation if that person for whose defamation they are claiming damages *is personally identified in the publication* and according to what is stated herein. Let us see.

I

The facts pertinent to the controversy at bar are the following:

This concerns a cause of action brought against El Vocero by reason of the publication of allegedly defamatory information against the person of Carlos O. Rodríguez Rivera, who at the time worked as Director of the Criminal Investigations Corps of the Puerto Rico Police, Ponce Region. Mister Rodríguez Rivera *and his wife,* Mrs. Emérita Mercado, claimed damages for the alleged damage that the publication made by El Vocero caused them. The defendant requested the dismissal of the cause of action *of the wife of the man implicated in the news item,* since she was neither mentioned nor in any manner identified.[1] The court of instance denied the request for dismissal and resolved that Mrs. Mercado had a cause of action *for damages contingent* on her husband's cause of action for damages. The defendant came before us by means of the same argument presented in its request for dismissal. We issued the corresponding writ.

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[1] This refers to two news items published by El Vocero, one on its Saturday edition, January 14, 1989, and the other, on Saturday, January 21, 1989. The first one appeared published on page 39 under the headline "Ponce CIC Chief Disauthorized on Agents' Transfers". The second one was published under the headline "Resignation Requested From CIC Chief". It is not in controversy that this has to do with a claim for damages product of the publication of alleged defamatory expressions against the person of a third party and *that in the publication the lady plaintiff is neither directly mentioned nor did it deal directly with her person.* Nevertheless, in said news items *there does exist a direct reference to the husband of the lady appellee.*

II

In evaluating the claim by the lady plaintiff we must recognize, at the onset, that the cause of action for which the complaint was presented is a general cause of action *for damages*, and not one exclusively for defamation. This is so since not every cause of civil action in which damages are claimed as the consequence of the publication of information about one person, constitutes a cause of action for libel or defamation.[2] See *Torres Silva v. El Mundo*, 106 D.P.R. 415 (1977); *Romany v. El Mundo*, 89 D.P.R. 604 (1963); *Colón v. Romero Barceló;* 112 D.P.R. 563 (1982).

The object for protective law in the action for defamation and for whose affection recovery is claimed, is the *personal reputation* of the subject publicly injured. See Sanford, Libel and Privacy, Prentice Hall Law & Business Pb., U.S.A., Second Ed. 1993 supp., p. 95-100.[3]

It is a matter of the right which the legal codes recognize to natural or juridical persons to defend their name before the eyes of others, which consists in the interest: (1) to protect the relationship he has with third

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[2] In general terms, libel is known as the defamation carried out by written means. See Smolla, *Law of Defamation*, Clark Boardman Callaghan Entertainment & Communications Law Library, USA (1991).

[3] Sanford explains that the historical development of the right concerning actions for defamation, and points out how the defense of the reputation and good name is stressed and becomes a need and an object to be judicially protected, with the transformation of the ancient feudal regimes of an agrarian nature into urban mercantile societies.

parties; (2) to protect the probability of future relationships with third parties; (3) to protect his public image in general, and (4) to prevent that a negative image of him be created if he were to lack public recognition in the present. Anderson, *Reputation, Compensation and Proof*, 25 Wm. & Mary L. Rev. 747, 764-66 (1984).

To such effect, the object of the action for damages for defamation is to provide compensation *for the loss of reputation and the loss of the good name* of the injured person and not to provide compensation for the occurrence of other type of damages, as the emotional anguish suffered and the possible interference there has been with the privacy of the libeled person, among others. "The orthodoxy has always been that the primary function of the law of defamation is to protect the relational interest in loss of reputation rather than to compensate for the emotional disturbance caused by the defamation, which was left primarily to the law of privacy and the infliction of emotional distress". [Notes omitted]; Smolla, *Law of Defamation*, Clark Boardman Gallagher Entertainment Communications Law Library, U.S.A., sec. 1.06[3] (1991). See Thomas, *The Law of Libel and Slander*, Oceana Editorial Board, U.S.A. P. 70-75 (1973). See Sack, *Libel, Slander and Related Problems*, Practicing Law Institute, NY p. 385-386 (1980).

Accordingly, in *Torres Silva v. El Mundo*, Inc., supra, pp. 423-424, we recognized that "the libel action is an action for the recovery for damages *directed at vindicating the social interest in the reputation of the person*, for which reason it perfectly fits into the liability rule set forth in Article 1802." See *Porto v. Bentley P.R. Inc.*, op. of December 23, 1992, 92 JTS 175. Such actions for defamation may

be contained or immersed in a general action for damages, but they do not encompass the totality of remedies provided by these. To such purpose, related, but different since it is more encompassing, is the action for damages under Article 1802 of the Civil Code, 31 L.P.R.A. 5141, by means of which a plaintiff, instead of requesting *compensation exclusively* for the injury caused to the reputation of the defamed person and to his relations within the community, seeks to obtain recovery for other resulting damages, as for example, the damages and mental and moral anguish which the published statements have produced. See *Torres Silva v. El Mundo*, supra; *Colon v. Romero Barceló*, supra; *Méndez Arocho v. el Vocero*, op. of June 30, 1992, 92 JTS 94.

It becomes fundamental to recognize such differences at the moment of evaluating the applicability of doctrines developed in common law, when adjudicating libel claims, to actions for damages and mental anguish under the protection of Article 1802 of our Civil Code, 31 L.P.R.A. 5141. The most enlightened and fair rule of law may turn into the greatest absurd or the greatest arbitrariness if applied unthinkingly and in an automatic manner to judicial situations different from those for which it was developed, doing without the principles it embodies and the judicial interests it seeks to protect. With this in mind is that we must examine the applicability of the "of and concerning the plaintiff" doctrine to the controversy at bar.

III

Within the scope of the actions for defamation in common law the doctrine known as "of and concerning the plaintiff" has been elaborated, which requires that in every

action for *defamation* the plaintiff prove that the defamatory expressions *refer to his person in a particular manner.* The specific reference requirement, or "of and concerning the plaintiff" statement, limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of non-specific statements that they believe cause them some hurt; *Blatty v. New York Times,* 728 P. 2d 1177 (Cal 1986).

This doctrine prevents claims for vicarious defamation; Sack, *op. cit.* p. 122, and claims for defamations made against groups of persons when the plaintiff cannot prove that he was pointed to in an individual manner, that is, that reference to him or her was made in a particular and singularized manner. See *Rosado v. Fluor International,* 81 D.P.R. 608, 616 (1959); Sack, *op. cit.,* p. 116; Gatley, *On Libel and Slander,* Sweet & Maxwell Pb., London, 8th ed. pp. 274-296 (1981); Smolla, *op cit.,* sec. 4.09-4.10[1]. It has to do on first instance with a requirement concerning the identification of the defamed person; see *Rosado v. Fluor International,* supra.

In order to prevail in a cause *for defamation,* the plaintiff not only must prove that certain information published had a defamatory content, but he must be able to make the identification of himself as the person defamed. No writing may be considered libelous unless it reflects on a person in particular. "The true question always is: Was the individual or were the individuals bringing the action personally pointed to by the words complained of?"; Gatley, *op. cit.,* pp. 274-289. *It being an action directed at vindicating the personal reputation of the*

injured, it logically requires that the identity of the injured diaphanously arise from the publication in question.

On its part, the United States Supreme Court has recognized that the doctrine [stating] that the publication be of and concerning the plaintiff enjoys constitutional dimension. In the renowned decision of *New York Times v. Sullivan*, 376 U.S. 254 (1963), the highest federal court considered that it resulted constitutionally defective *the adjudication of libel* made by a jury in favor of the Commissioner in charge of the Police of the state of Alabama, when he himself did not contribute proof that the alleged defamatory expressions, contained in an advertisement published by the Times against the police force, dealt with his person.

The Court held that:

> *This proposition has disquieting implications for criticism of governmental conduct.* For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of Jurisprudence." City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88 (1923). The present proposition would sidestep this obstacle *by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that it would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community."* Raising as it does the possibility that a good-faith critic of government will be

> penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. We hold that such a proposition may not be constitutionally utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." *New York Times v. Sullivan*, supra, pp. 291-292. (Emphasis supplied)

Such reasoning was later reaffirmed in *Rosenblatt v. Baer*, 383 U.S. 75, 81-82 (1966), when said court resolved that *by requirement of the First Amendment* of the Federal Constitution, an impersonal attack on governmental operations could not provide grounds for *a libel action* on the part of those in charge of managing said governmental activity, in the absence of proof that the attack specifically focused on their particular persons.

In that sense the "of and concerning the plaintiff" doctrine enjoys constitutional rank as to preventing that an *impersonal* attack or questioning of governmental activity or of a matter of public interest may give grounds *for an action for libel* on the part of the officials or figures publicly responsible for said activity; being thus able to discourage or to penalize the exercise of public discussion and scrutiny of these matters.

In these cases the specific reference requirement serves to immunize types of statements that should not be discouraged since they are important to maintain the vigor and openness of public discourse in a free society. Like the statements that express an opinion, the statements which lack a specific reference enjoy immunity

under the protection of the First Amendment, inasmuch as they serve the fundamental interest of encouraging and guaranteeing public debate and open, free and robust criticism of government activity and other matters of public interest. *Blatty v. New York Times,* supra; *Rosenblatt v. Baer,* supra. "It is far better for the public welfare that some occasional and consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that the free discussion of politics or morals or faith should be checked by the dread of embittered and boundless litigation"; *Blatty v. New York Times,* supra, p. 1184.

In consequence, the guarantees contained in the First Amendment of the Federal Constitution in favor of the freedom of speech and of the press, prohibit that any state grant a remedy or recognize a cause of action *for libel* to a citizen for impersonal statements made on issues of public importance, *without a defamatory reference to his person in his personal character.* Once this specific reference requirement has been satisfied, it will fall on the plaintiff to prove his cause of action for libel according to the liability rules constitutionally applicable as elaborated by the Federal Supreme Court and by this Court.[4]

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[4] See, *New York Times v. Sullivan,* 376 U.S. 254 (1963); *Garrison v. Louisiana,* 379 U.S. 64 (1964); *Rosenblatt v. Baer,* supra; *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *Associated Press v. Walker,* 388 U.S. 130 (1967); *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985); *Méndez Arocho v. El Vocero,* op. of June 25, 1992, 92 JTS 94; *Villanueva v. El Vocero,* op. of June 25, 1991, 91 JTS 58; *Maldonado Negrón v. Marrero y Blanco,* 121 D.P.R. 705, 713-718 (1988); *Ocasio v. Alcalde de Maunabo,* 121 D.P.R. 37 (1988);

IV

To that effect, we harbor no doubts as to that the specific reference doctrine in its constitutional aspect *equally applies to actions for damages for mental anguish derived from a press publication.*

In *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988), the highest federal forum resolved that the First Amendment similarly limits the authority of the states to grant a remedy for damages and mental anguish in abridgment of the right of freedom of speech and of the press. The court *rejected* the appellee's argument that a different liability rule should be applied, since the state did not seek to prevent a harm to the reputation of the citizens but sought to prevent the severe emotional harm which suffer those victims of an offensive publication.

Said Supreme Court pointed out that the issue at heart is to guarantee that public debate and the free discussion of ideas remain free from governmentally imposed sanctions. The court made clear that this does not mean that any speech will turn out to be immune from sanction in the form of damages, but that such sanction must meet the constitutional liability rules adopted in *New York Times v. Sullivan,* supra, as to proving that it has to do with the imputation of false facts, and the level of culpability required as to what the case

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Sociedad de Gananciales v. López, 116 D.P.R. 112 (1985); *Oliveras v. Paniagua Diez,* 115 D.P.R. 685 (1984); *García Cruz v. El Mundo,* 108 D.P.R. 174 (1978); *Cortéz Portalatín v. Hau,* 103 D.P.R. 7334 (1975); *Zequeira Blanco v. El Mundo,* 106 D.P.R. 432 (1977); *Alberio Quiñones v. E.L.A.,* 90 D.P.R. 812 (1964)

may be in terms of a public figure or a private figure. *Hustler Magazine v. Falwell,* supra, pp.51-52.

Similar grounds support our decision of today concerning that by constitutional requirement, a claim does not lie for damages against the press because of information which reflects an impersonal attack on governmental activity or any other of public transcendence on the part of those in charge of said activity in the absence of specific and individualized reference to any person and according to the applicable constitutional rules of liability.

V

Now, concerning the action for damages object of the controversy at bar, in the news items published, the allegedly defamatory imputations *are not directed in an impersonal manner against governmental activity, but they specifically focus on one person in particular who is personally imputed with having acted in an improper manner.*

In constitutional terms, the specific reference requirement is satisfied in this situation. The problem of whether this specific reference allows *the relatives of the person defamed* to bring an action for damages for the mental anguish suffered by cause of the publication, *is not contemplated by the constitutional doctrine in effect. We have to resort to the analysis and ponderation of the interests in conflict in order to resolve this controversy.*

Article 1802 of the Civil Code, 31 L.P.R.A. 5141, provides that a person who by an act or omission causes damage to another through fault or negligence, is obliged to repair the damage so caused. "Our jurisprudence has

recognized that the concept of fault in Art. 1802 is as infinitely broad as any fault of a person who brings about harm or injury"; *Colón v. Romero Barceló*, supra, p. 579; *Bonilla v. Chardón*, 118 D.P.R. 599, 610 (1987). "According to the cited article, which establishes one of the most fundamental principles of our legal code – that of achillean liability for our own deeds – all damage, material or moral, is cause for compensation if three requirements or elements are present: first, the reality of the damage caused is established; second, a causal nexus exists between the damage and the act or omission of the other person; and third, said act or omission is culpable or negligent. [cites omitted] That precept ' . . . does not admit limitations or exceptions of any kind; and therefore, the person who causes damage due to fault or negligence, whatever the consequences be, is obliged to repair it'. Borrell, *op. cit.*, p. 169. *Hernández v. Fournier*, 80 D.P.R. 93, 96 (1957); *Reyes v. Sucn. Sánchez Soto*, 98 D.P.R. 305, 311-312 (1970). In short, "the concept of fault includes every type of human transgression in the legal order as well as in the moral order." *Reyes v. Sucn. Sánchez Soto*, supra, p. 313.

According to this position, we conclude that Article 1802 admits the cause of action being claimed in the case at bar, because it has to do with allegation of *damages and mental anguish* of the plaintiff's wife.[5]

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[5] We have not made an expression as to whether the conjugal partnership has such cause of action and as to whether an action for loss of profit is in order, since that has not been brought up in this case.

If the subject himself who is the object of the injurious information is entitled to recover for damages – for defamation or damages and mental anguish – by cause of the information published, his wife, children or third parties who have suffered damages and mental anguish due to the information published, must have a cause of action for damages.[6]

We cannot escape from the sociological and psychological reality that a wife, the children or the parents of a person who has been defamed, *by reason of their relationship with the person so defamed* can also be themselves affected by the publication of the defamation.

As an example: the children, the wife or the parents of a person who has been defamed by the imputation that he is "a thief or a murderer", on occasion may suffer damages and mental anguish due to the social rejection which develops against them due to their relationship with the defamed person; due to the stigma that this entails; due to the comments and negative attitudes

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[6] It must be noticed that in this Court's recent decision in *Méndez Arocho v. El Vocero*, op. of June 29, 1992, 92 JTS 94, it was resolved that, contrary to the majority trend in effect in the United States which rejects recognizing actions for the defamation of dead persons, in our jurisdiction, by statutory provision, Article 2 of the Libel and Slander Act of 1902, 32 LP.R.A. sec. 3142, a libel action is recognized *in the case of relatives and friends of the deceased defamed when a malicious defamation is made public about the latter with the intention to blacken or vilify his memory and to scandalize or provoke the former.* There we affirmed the summary judgment entered in favor of the defendant, since the plaintiffs did not show that they had proof to controvert that of the defendant and that he acted in an intentional manner or with crass malice and reckless disregard for the truth.

which develop against him and his family, and by the mere bond of kinship. Such reality, although sad, is inescapable. Our law must recognize a cause of action by them against the one who made such defamation and caused the damages and mental anguish. We cannot administer justice half way.

Nevertheless, the elements constituting such cause of action must be in harmony with the constitutional provisions in favor of the freedom of speech and of the press, particularly as to the degree of culpability required, since said cause of action is contingent on the main cause of action which the defamed person has.

Because of it, it must be proved that the information about the defamed person is false and that as a product of same, the third party claimants suffered actual damages. See *Maldonado y Negrón v. Marrero y Blanco,* 121 D.P.R. 705, 715 (1988). If the person object of the injurious information, or the claimant, are public officials or public figures[7], *it is also necessary to show the existence of actual malice, this is, that the imputations against the defamed person were published with knowledge of their falsity or with reckless disregard of whether they were true or not. Soc. de Gananciales v. López,* 116 D.P.R. 112 (1985); *Oliveras v. Paniagua Diez,* 115 D.P.R. 257 (1984); *García Cruz v. El Mundo,* 108 D.P.R. 174 (1978);

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[7] Concerning the definition of public figure, see *Aponte Martínez v. Lugo,* 100 D.P.R. 282, 293 (1971); *Torres Silva v. El Mundo, Inc.,* supra; *García Cruz v. El Mundo, Inc.,* 108 D.P.R. 174 (1978); *Pueblo v. Olivero Rodríguez,* 112 D.P.R. 369 (1982); *Maldonado y Negrón v. Marrero y Blanco,* 121 D.P.R. 705 (1988); *Ocasio v. Alcalde de Maunabo,* 1221 D.P.R. 37 (1988); *Villanueva v. El Vocero,* 91 JTS 58.

Zequeira Blanco v. El Mundo, 106 D.P.R. 432 (1977); *Torres Silva v. El Mundo*, supra. Finally, exceptionable to these actions for damages caused by the defamation of a third party shall be all those defenses which, by virtue of the right of freedom of expression and of the press, the defendant raise before the third party object of the defamation. See *Villanueva v. El Vocero*, op. of June 25, 1991, JTS 58.

In short, this has to do with causes of action for which there will not exist a right to a remedy in those situations *where the subject himself who is the object of the injurious information is not himself entitled to recover for damages – for defamation or damages and mental anguish – by cause of the information published.*

To resolve otherwise would result in an abridgment of that vital space for democratic expression in which at present the country's press operates and in the upsetting of the necessary balance between the right of the people to freely express and diffuse ideas and information and to receive them via the social communications media, on the one hand; and the right to be protected against abusive attacks on a person's honor, reputation and to his private and family life, on the other. Commonwealth of Puerto Rico Constitution, Art. II, Sec. 1, 4 and 8.

Therefore, the court of instance did not err when it refused to dismiss the action brought by Mrs. Mercado de Rodríguez. The "of and concerning the plaintiff" doctrine does not prevent, per se, such action for damages *inasmuch as there was a specific reference to the person of her husband in the publication.*

Judgment in Accordance shall be entered.

(sgd.)
Rafael Alonso Alonso
Associate Justice

IN THE SUPREME COURT OF PUERTO RICO

The Conjugal Partnership constituted by Carlos O. Rodríguez, etc.	*	No. CE-91-414
Plaintiffs-Appellees	*	Certiorari
v.	*	
El Vocero de Puerto Rico Inc., et al	*	
Defendants-Petitioners	*	

JUDGMENT

In San Juan, Puerto Rico, February 7, 1994

On the grounds previously stated in the Opinion of the Court, the Resolution of the Superior Court (Ponce Part) is hereby affirmed and the case is remanded for further proceedings.

It was so pronounced and is hereby ordered by the Court and certified by Mister General Clerk.

(sgd.)
Francisco Agrait Lladó
General Clerk

United States District Court
For the District of Puerto Rico
- CERTIFIED -
To be a correct translation prepared by:

Noris Vazquez
Certified Court Interpreter
Administrative Office of the
United States Courts